IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 117

THE GAS SERVICE COMPANY,
Petitioner,

vs.

OTTO R. COBURN, on Behalf of Himself and All Others Similarly Situated,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF ON THE MERITS

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ARGUMENT

I.

The Decision by the Court of Appeals Does Not Materially Affect Federal Jurisdiction or Substantive Rights.

Petitioner contends that "the opinion of the Court of Appeals holds that procedural rules governing Federal

courts may modify their statutory jurisdiction established by Congress." In order to support its argument, petitioner assumes that the opinion of the Court of Appeals does in fact extend federal jurisdiction contrary to the provisions of Rule 82.[1] Respondent has never, and does not now, contend that the Federal courts, by promulgation of rules of procedure, can extend the jurisdiction conferred by statute. Indeed, we agree that the Federal courts are powerless to do so. *Sibbach v. Wilson*, 312 U.S. 1 at p. 10. It is equally clear, however, that Federal courts are not powerless to make decisions affecting jurisdiction, as this Court held in *Venner v. Great Northern Railway Company*, 209 U.S. 24 at p. 35:

> "The jurisdiction of the circuit court is prescribed by laws enacted by Congress in pursuance of the Constitution, and this court by its rules has no power to increase or diminish the jurisdiction thus created, though it may regulate its exercise in any manner not inconsistent with the laws of the United States."

Interwoven into the question of whether the opinion of the Court of Appeals in this matter extends federal jurisdiction, and necessary to a determination of the question presented, is the effect, if any, which this decision has on substantive rights as raised by petitioner. Petitioner does not define or explain what substantive rights are involved, or to what party the rights extend. We can only assume that petitioner is referring to substantive rights of at least one of the parties and that the decision by the Court of Appeals in this case is contrary to the prohibition of the Enabling Act of June 19, 1934, which directed that rules of practice for district courts, "shall neither

1. Federal Rules of Civil Procedure, Rule 82, provides in pertinent part: "These rules shall not be construed to extend or limit the jurisdiction of the United States District Courts or the venue of actions therein. . ."

abridge, enlarge nor modify the substantive rights of any litigant." *Mississippi Publishing Corporation* v. *Murphree*, 326 U.S. 438.

There is no question but that the concept of aggregation of claims for jurisdictional amount purposes was established prior to the adoption of the *Rules of Civil Procedure for District Courts* in 1938. *Pinel* v. *Pinel*, 240 U.S. 594, sets forth the rule regulating the circumstances under which aggregation of claims was permissible in joinder actions. Subsequent to *Pinel*, and following the adoption of the *Rules of Civil Procedure*, a vast number of cases were decided construing original Rule 23 in which the question of aggregating claims for purposes of jurisdictional amount was involved. The categories "true," "spurious" and "hybrid," and the terms used in connection with each category, evolved from the multitude of decisions construing Rule 23. Aggregation of claims was allowed only in "true" class actions which involved interests or rights of claimants that were said to be common and undivided. *Thomson* v. *Gaskill*, 315 U.S. 442. Aggregation was prohibited in "spurious" and "hybrid" actions, which involved interests or rights that were said to be separate and distinct. The more important of these decisions are cited in *Thomson* v. *Gaskill*, supra.[2]

Petitioner's position seems to be that these cases represent substantive law, having been decided according to statutory jurisdiction standards, and that substantive law is not subject to change or modification by decisions interpreting the *Rules of Civil Procedure*. We come then to the crux of petitioner's contention. Is the rule or law concerning aggregation of claims substantive or procedural? Unfortunately, there is no clear line of distinction

2. See also pages 11 and 12 of petitioner's brief.

between these two areas. In an effort to distinguish these areas this Court has said:

> "The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law, and for justly administering remedy and redress for disregard or infraction of them."[3]

There is no question that Congress and only Congress has the power to establish the amount requisite to federal jurisdiction. The Court of Appeals obviously was aware of this limitation upon the rule-making power of Federal courts when it said in the opinion, in the case at bar:

> "It is true, of course, that the rule-making power does not include the right to create or abrogate substantive law, and that as a consequence no rule can lift or lower the $10,000 restriction upon federal jurisdiction." (A. 23)

Conversely, Congress has never seen fit to enact any statute respecting aggregation of claims. That question has been left solely to the Courts for determination. Prior to the amendment of Rule 23, aggregation of claims was allowed under certain circumstances and prohibited under other circumstances entirely by judicial decision. The jurisdictional amount limitation was established for the Courts by Congress. The Courts, by case decisions, determined the judicial process for enforcing the rights and administering the remedy. This would appear to be procedural as opposed to substantive, and as such, clearly outside the prohibition expressed in the Enabling Act as well as the test established in *Sibbach* and followed in *Hanna*.

The Court of Appeals considered the question of whether the application of the concept of aggregation of

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3. *Sibbach* v. *Wilson*, 312 U.S. 1 at p. 14; *Hanna* v. *Plumer*, 380 U.S. 460 at p. 464.

claims was procedural or substantive. After reflecting upon this Court's decision in *Provident Tradesmen Bank and Trust Co.* v. *Patterson*, 390 U.S. 102, the Court of Appeals said:

> "Similarly we believe the elimination of categories of class actions in Rule 23 involves no substantive change and is no bar to the application of aggregation of claims to establish monetary jurisdiction. The basic jurisdictional question is whether aggregation under *any* circumstances can meet the legislative mandate pertaining to the monetary restriction on federal jurisdiction. This question has been answered in the affirmative, *Gibbs* v. *Buck*, supra, and it follows under the new rule, that when a cause clearly falls within its terms as a class action, as here, the claims of the entire class are in controversy." (A. 25)[4]

The statute limiting federal jurisdiction in diversity cases does not, on its face, limit the "matter in controversy" to the claim of a single litigant.[5] It is entirely accurate to say that in a class action under amended Rule 23, the "matter in controversy" is the claim or claims of the members of the class as a whole, once the trial court has determined, according to the standards set out in amended Rule 23, that the action should proceed as a class action. The claims of the class, aggregating the total value, and the rights of the members of the class holding the claims, will be finally adjudicated in the single class action and the members of the class bound by the judgment. Therefore, we say, aggregation of claims for purposes of determining the amount in controversy is jus-

4. *Gibbs* v. *Buck*, 307 U.S. 66.

5. "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, . . ." 28 USCA 1332(a).

tified in class actions under new Rule 23 if it was ever justified, and the concept of allowing aggregation of claims for jurisdictional amount was established before the adoption of either the original or amended Rule 23.

Stated another way: we suggest, as did the Court below, that if there has ever been a question of substantive law in this area, it was whether claims of more than one party could be aggregated for jurisdictional purposes under any circumstances. This question was decided long before it was presented under the procedures established for class action in original Rule 23 or the amendment of that rule.

We submit that the Court of Appeals correctly concluded that the matter in question is one of procedure as opposed to substance. Accordingly, the opinion of the Court of Appeals in this case is simply not subject to the interpretation advanced by petitioner.

II.

The Decision by the Court of Appeals Is the Only Logical and Workable Interpretation of Amended Rule 23.

Decisions have been rendered by two other Courts of Appeals concerning aggregation of claims under amended Rule 23. Those decisions are *Alvarez* v. *Pan American Life Insurance Co.; et al.*, 375 F.2d 992 (5 Cir.) and *Snyder* v. *Harris*, 390 F.2d 204 (8 Cir.), 268 F.Supp. 701. Both *Alvarez* and *Snyder* were decided on the basis that the parties were seeking to aggregate claims that were separate and distinct. The respective Courts, without saying as much, first categorized the claims of plaintiffs as "spurious" or "hybird" according to decisions under original Rule 23.

Petitioner at page 6 of its brief, complains that:

> "The court below did not attempt to categorize this action under amended Rule 23 nor to characterize its nature for jurisdictional purposes, since it concluded that aggregation of claims of class members is now authorized whenever a class suit is appropriate under the amended rule (App. 25)."

It would appear that petitioner contends that the action should first be classified by the Court under one of the categories established under original Rule 23 as was done in both *Snyder* and *Alvarez*. We submit that a determination of the nature suggested by petitioner and followed in *Alvarez* and *Snyder* is exactly what the Advisory Committee was attempting to avoid by the amendment of Rule 23. The comments of the Advisory Committee concerning Rule 23 at the time it was amended should not be ignored. Indeed, as this Court stated in *Mississippi Publishing Corporation* v. *Murphree*, 326 U.S. 438 at p. 444:

> "The fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistence. But in ascertaining their meaning the construction given to them by the Committee is of weight."

The Advisory Committee considered as one of the most serious problems the involvement with original Rule 23 in the categories of "true," "spurious" and "hybrid" class actions and the terms used in connection with each of the categories.[6] *Advisory Committee's Note*, 39 F.R.D.

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6. The terms referred to are "joint, common and undivided," used in connection with "true" class actions and "several" and "distinct" for "spurious" and "hybrid" class actions. The Committee carefully avoided the use of any of these terms and observed that they had proved to be obscure and uncertain in their application. 39 F.R.D. 69 at p. 98.

69 at pages 98-99. Another serious problem with original Rule 23, as found by the Advisory Committee, was that the "spurious" action was not really a class action at all. Rather, it was an action in which putative members of the "class" could intervene. Id. p. 99. In effect, the actions prosecuted under original Rule 23 were both class actions and joinder actions and the reason for the varying rule as to aggregation of claims under original Rule 23 was to some extent logical. Amended Rule 23, on the other hand, contemplates only one form or category of class action in which the court must determine that the action meets all of the standards of the amended rule and, therefore, should be prosecuted as a class action. There can be no logical basis for now allowing aggregation in one class action and refusing it in another.

Booth v. *General Dynamics Corp.*, 264 F.Supp. 465 (N.D. Ill., E.D., 1967), was decided independently on the same theory as the case at bar. The Trial Court wrote:

> "The recent amendments to the Federal Rules of Civil Procedure have extinguished the tortured distinction between 'true' and 'spurious' class actions. New standards for determining whether a class action is maintainable were established under the new Rule 23. It is by these new standards, rather than under the outworn authorities cited by the present litigants, that we must determine whether this suit may be maintained as a class action, and consequently, whether the claims of all members of the class may be aggregated to meet the jurisdictional amount."

In framing amended Rule 23, the Advisory Committee undoubtedly considered the problem of aggregation of claims in relation to the new rule. Rule 23(b)(3) sets out certain pertinent factors (A) through (D), which the Court is to consider in determining that a class action is superior to other available methods to litigate the contro-

versy. In relation to these factors, the Advisory Committee has said:

> "Factors (A)-(D) are listed, non-exhaustively, as pertinent to the findings. The court is to consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit. . . . In this connection the court should inform itself of any litigation actually pending by or against the individuals. The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical: the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, *or the amounts at stake for individuals may be so small that separate suits would be impracticable.*" (Emphasis added) *Advisory Committee's Note*, 39 F.R.D. 69 at p. 104.

It seems obvious from this language that the Advisory Committee specifically considered members of a class having claims less than $10,000 in drafting the new rule.

Professor Charles Wright correctly isolated the question presented by the case at bar and suggested the appropriate answer when he wrote:

> "The greatest difficulty comes with regard to jurisdictional amount. As a function of the general principle that aggregation is permitted by parties jointly or commonly interested, but not where claims are several and distinct, it was held under the former rule that aggregation of the claims of all members of the class was permitted in 'true' class action, where the rule required a 'joint' or 'common' interest, but not in 'hybrid' or 'spurious' class action. The amended rule nowhere refers to a 'joint' or a 'common' interest. It would be convenient if it should be held that, since the judgment is binding under the amended rule on the entire class, the claims for or against the whole class

are in controversy. This would be an entirely realistic view, and one entirely consonant with the stated purpose of the amount in controversy requirement, to avoid having the federal courts 'fritter away their time in the trial of petty controversy.' A good deal of ancient learning will have to be forgotten, however, if this practical and sensible result is to be reached.

"If the Courts continue to apply the ancient learning, it will be necessary to consider in each case, in which the claims of the named representatives are not themselves for more than $10,000 whether the interests involved are 'joint' or 'common,' an inquiry which is frequently quite difficult and which it was a purpose of the amended rule to avoid. If the interests are joint or common, then the relation of the parties will be such that their action would fall under (b) (1), but it does not follow that all (b) (1) actions will involve joint or common interests." *Barron and Holtzoff's Federal Practice and Procedure*, Vol. 2, 1967 Pocket Part, p. 106.

We would go even further than Professor Wright's suggestion that aggregation of claims of the entire class would be convenient. We contend that without this construction, Rule 23, as amended, is burdened with exactly the problems inherent in the original rule that the Advisory Committee was attempting to eliminate because the distinguishing categories had proved to be obscure and uncertain tests.

Petitioner contends that the Court of Appeals neither mentions nor discusses the problems and implications which arise from its decision. However, the only problem or implication of any serious nature which petitioner mentions is the possibility that the Federal District Courts will be overwhelmed with litigation and Congressional restrictions upon their jurisdiction will be swept aside if the decision of the Court of Appeals is not reversed. A sufficient

answer to that contention is to point out that amended Rule 23 actually has more requirements to be met before a class action can be maintained than were contained in original Rule 23 and the decisions construing it. In addition, the District Court exercises considerable discretion in determining whether the action should be litigated as a class action. Accordingly, federal class action litigation should be more restricted under amended Rule 23 regardless of aggregation. Moreover, if the categories of "true," "spurious" and "hybrid" are to be kept alive and District Courts must first apply the old standards for jurisdictional purposes and then test the action for sufficiency under amended Rule 23, then all of the problems of original Rule 23 will still be with the courts.

This problem is vividly demonstrated in *Lesch* v. *Chicago & Eastern Illinois Railroad Co.*, 279 F.Supp. 908 (1968). The Court, following *Alvarez*, considered aggregation in light of the categories of the original rule and found that the action in question was "spurious" as opposed to "true." Little or no consideration was given to the requisites of Rule 23 as amended. The case was decided under Rule 23 as if it had never been amended and as if the old categories of "true," "hybrid" and "spurious" were still controlling.

CONCLUSION

Amended Rule 23 should not be burdened with the obscure and uncertain categories which existed under original Rule 23. To do so, would in effect, render the amendment of the rule sterile and useless, as held by both the Court of Appeals and District Court (A. 15, 24). The decision of both of the lower courts is consistent with the provisions of amended Rule 23 and the construction placed upon it by the Advisory Committee; they appear to em-

brace the spirit of interpretation approved by this Court in connection with amended Rule 19 when it said:

> "Concluding that the inflexible approach adopted by the Court of Appeals in this case exemplifies the kind of reasoning that the rule was designed to avoid, we reverse." *Provident Tradesmen Bank & Trust Co.* v. *Patterson*, 390 U.S. 102.

This decision does not extend federal jurisdiction contrary to Rule 82, and it does not alter the substantive rights of either party.

Respectfully submitted,

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